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Resisting the Allure of Better Rule of Law

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I never had the opportunity to meet Robert Leflar, but I have long admired his scholarship in conflict of laws. I would not hesitate to rank him among the most influential and important conflicts scholars of the 20th century, and I think it would be difficult to find a conflicts teacher today who would disagree. In preparing for this oral and written symposium in his honor, I read for the first time his autobiography, *One Life in the Law*,[1] and that raised him even higher in my esteem. I had always appreciated Robert Leflar the scholar, but I had been only vaguely aware of his other accomplishments—among other things, his leadership in the late 1940s in racially integrating the University of Arkansas School of Law student body,[2] his organization of the renowned Appellate Judges Seminars at NYU,[3] and his many contributions over the years to the development of Uniform State Laws[4] and to law reform in Arkansas.[5] I came away from my reading of *One Life in the Law* with the firm conviction that Robert Leflar exemplified the very best in legal academia not only as a scholar but in all aspects of his work.

Leflar's most famous contribution to the field of conflict of laws is almost certainly the list of five "choice-influencing considerations"[6] that he set forth in a 1966 article "to serve usefully

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1. ROBERT A. LEFLAR, ONE LIFE IN THE LAW: A 60-YEAR REVIEW (1985).
2. *Id.* at 82-86.
3. *Id.* at 25-37.
4. *Id.* at 61-69.
5. *Id.* at 69-82.
6. The five are: "predictability of results," "maintenance of interstate and international order," "simplification of the judicial task," "advancement of the forum's governmental inter-

as guides to solution of specific cases."[7] In addition to scholarly recognition, the list has won a following among a number of state high courts.[8] In this essay I will focus on the consideration that Leflar labeled "application of the better rule of law."[9] I will suggest that although better rule of law is an attractive idea and Leflar had substantial judicial and scholarly precedent for including it on his list, it raises various difficulties that seriously undermine its claim to application.

I. BETTER RULE OF LAW—ITS ORIGINS AND APPEAL

In proposing that courts factor into their choice-of-law decisions which of the two competing laws is "better," Leflar did not purport to be prescribing a new consideration for choice of law.[10] Rather, as he saw it, his effort was primarily to describe a phenomenon that had long been in existence in judicial decisions and that other scholars had already noted. Courts, Leflar argued in his 1966 article, have often been influenced in choice of law by whether one of the competing laws is "anachronistic, behind the times."[11] Because their express choice-of-law methodologies—as of 1966, almost always the traditional territorial rules, but in some jurisdictions a more modern approach in at least some types of cases[12]—made no room for a candid choice of the better law, courts manipulated the express methodology, resorting to subterfuges, to choose the better law.[13]

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ests," and "application of the better rule of law." *See* Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

7. *Id.* at 304.

8. According to a recent survey, five states (Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin) use Leflar's choice-influencing considerations to decide tort choice-of-law problems and two (Minnesota and Wisconsin) use them for contract choice-of-law problems. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. L. 233, 266 (1998). In addition, other courts at times have turned to Leflar's list for guidance. *See, e.g.*, Bushkin Associates, Inc. v. Raytheon Co., 473 N.E.2d 662 (Mass. 1985).

9. Leflar, *supra* note 6, at 295.

10. *See id.* at 295-304. *See also* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587-88 (1966) (summarizing the key points of his earlier presentation of better rule of law).

11. Leflar, *supra* note 6, at 299.

12. *See* GARY J. SIMSON, ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS: CASES AND MATERIALS 13-14 (3d ed. 1997).

13. *See* Leflar, *supra* note 6, at 300-04.

There can be little doubt that the case law provided ample support for Leflar's articulation of a better-law factor. Most obviously, in various cases the court, even though not assigning significance to a better-law factor in its formal grounds for decision, discussed the competing laws in a way that strongly suggested that a better-law preference was in fact a motivating factor in its decision.[14] Consider, for example, *Milliken v. Pratt*[15]—the married women's contract case made famous by Brainerd Currie.[16] The case pitted a Massachusetts law limiting married women's contractual capacity against a Maine law giving married women the same contractual powers as unmarried women.[17] The language of the Massachusetts high court's opinion gives rise to a strong suspicion that the court's choice of the more progressive Maine law was influenced at least in part by a sense that the Massachusetts law was anachronistic. In rejecting the notion that local public policy barred application of the Maine law, the court pointed out that "it is not true at the present day [1878] that all civilized states recognize the absolute incapacity of married women to make contracts."[18] Rather, "[t]he tendency of modern legislation is to enlarge their capacity in this respect, and in many states they have nearly or quite the same powers as if unmarried."[19]

As Leflar conscientiously footnoted in offering his better-law consideration,[20] the scholarly precedent for recognition of a better-law factor was also substantial. Although Leflar's discussion of a better-law factor in his 1966 article appears to be far more thorough and extensive than any prior scholarly discussion

14. In agreement with Leflar, I also have little question that there are quite a few cases where although there is no language in the court's opinion suggesting that a better-law factor may have played a part in the court's thinking, such a factor was in fact influential.

15. 125 Mass. 374 (1878).

16. *See* Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958), *reprinted in* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 77-127 (1963).

17. As the court noted, in the period between the making of the contract at issue in *Milliken* and the filing of the suit, the Massachusetts legislature had "extended" a married woman's contractual powers "so as to include the making of all kinds of contracts, with any person but her husband, as if she were unmarried." *Milliken*, 125 Mass. at 383. The new statute did not apply retroactively to contracts made before its enactment. If it had, the contract in *Milliken* would have been valid under Massachusetts as well as Maine law.

18. *Milliken*, 125 Mass. at 383.

19. *Id.*

20. *See* Leflar, *supra* note 6, at 295-304.

of it, various other prominent conflicts scholars had raised and endorsed a similar idea. In the course of his famous article, *Chief Justice Stone and the Conflict of Laws*, Paul Freund took the view that "[i]f one of the competing laws is archaic and isolated in the context of the laws of the federal union, it may not unreasonably have to yield to the more prevalent and progressive law, other factors of choice being roughly equal."[21] Similarly, hypothesizing "a situation in which one of the possibly applicable laws is in tune with the times and the other is thought to drag on the coat tails of civilization,"[22] Elliot Cheatham and Willis Reese in their classic article, *Choice of the Applicable Law*, maintained that it is "reasonable to assume that in such a case" a court "would do its best" to choose the more progressive law.[23] Moreover, while suggesting that "[o]n occasion" choice of the more progressive law might be inappropriate in light of other choice-of-law considerations, Cheatham and Reese maintained that it is otherwise "hardly open to criticism."[24]

By including "application of the better rule of law" on his short list of five choice-influencing considerations[25] and expounding at some length on the basis for including it on that list,[26] Leflar gave better rule of law a prominence in conflicts

21. Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216 (1946).

22. Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 980 (1952).

23. *Id.*

24. *Id.*

25. Leflar's list was distinctive both for its brevity and for its inclusion of better rule of law. In an article that Leflar called "the first thorough effort to catalogue all the choice-influencing considerations," *see* Leflar, *supra* note 6, at 268. Professors Cheatham and Reese listed nine considerations. *See* Cheatham & Reese, *supra* note 22. Although Cheatham and Reese briefly discussed a better-law type factor in the course of that article, *see supra* text accompanying notes 22-24, they did not give it the status of a separate consideration. Rather, they incorporated it into their discussion of a consideration that they labeled "the fundamental policy underlying the broad local law field involved." Cheatham & Reese, *supra* note 22, at 978-80. Several years later, Professor Yntema followed the Cheatham-Reese effort with his own list of 17 considerations. *See* Hessel E. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 734-35 (1957). He suggested that the 17 considerations could be grouped under two headings, "security" and "comparative justice." *Id.* at 735. Although, as Leflar noted, "Yntema's identification of the content of the policy favoring 'comparative justice' gives it a meaning similar to preference for the 'better law,'" *see* Leflar, *supra* note 6, at 296 n.103, neither Yntema's list of 17 considerations nor his two headings give better rule of law the type of express recognition that Leflar gives it in his list.

26. *See* Leflar, *supra* note 6, at 295-304; Leflar, *supra* note 10, at 1587-88.

theory that it previously had not enjoyed. In part, his objective in affording better rule of law such prominence was simply descriptive accuracy. Leflar's project in compiling the list was, in his words, "to restate the considerations that have, expressly or impliedly, always underlain common-law choice-of-law decisions,"[27] and a fair description in his view of what courts had been doing called for inclusion of better rule of law on the list. To some extent, however, his objective in highlighting better rule of law was also to get courts to state openly their reliance on this consideration, so that the reasons that genuinely drive courts' decisions would be out in the open where they could be fairly evaluated. As he wrote in his autobiography, "real reasons . . . deserve clear enunciation, not only in counsels' arguments and at the conference table, but also in the opinions that set forth judge-made law and prescribe that law's meaning and scope."[28]

While asking courts to make express their reliance on better rule of law, Leflar also provided them with a substantially more elaborate policy justification for invoking better rule of law than prior scholars had offered. He rested better rule of law squarely on its relationship to the goal of achieving justice in the individual case:

> "Justice in the individual case" has always been one of the objectives of law, and it has at times been suggested as the best ultimate that could be aimed at in choice-of-law cases . . . . In a sense, justice in a particular case calls for individualization of decisions, a choice of the better party in the litigation rather than of the better law. Such individualization is not outside the function of law, and judges sometimes properly take pride in it, but it at the same time is a bit frightening to one who, remembering that P's justice may be D's damnation, is anxious to maintain "the rule of law as against the rule of men." A choice between competing rules of law is more impersonal, less subjective, more in keeping with the traditional law-discovering functions of a common-law court. When the choice is deliberately made in favor of applying what by the forum's stan-

27. Leflar, *supra* note 6, at 282.

28. LEFLAR, *supra* note 1, at 127. *See also* Leflar, *supra* note 6, at 304 ("[I]t would be more to the point if the cover-up were played down and the discussions [in arguments by opposing attorneys and in court opinions] were directed specifically, as in nonconflicts cases, to the question of which rule of law deserves preference.").

> dard is the better of the competing rules of law, it is likely that justice between the litigating parties, according to the forum's standards, will be approximated too. The larger consideration seems to serve all the purposes of the narrower one, and to serve them more acceptably.[29]

In the remainder of this essay, I consider whether, precedent aside, better rule of law can withstand the scrutiny to which Leflar's candid approach exposes it. First, I maintain that, unless applied in a substantially more limited manner than courts typically have applied it and than Leflar apparently contemplated it would be applied, better rule of law offers a much less objective means for achieving justice in the individual case than Leflar's above policy justification suggests. Second, and more fundamentally, I argue that, even if better rule of law is applied in a manner that promises a fairly high degree of objectivity in application, it is seriously at odds with basic principles of judicial and legislative authority and evenhanded treatment of litigants.

II. DIFFICULTIES IN APPLICATION

In applying better rule of law, courts vary with regard to which, and how many, factors they take into account. The factors most commonly considered appear to be: trends in state adoptions of laws like those competing for application in the case at hand;[30] the number of states that have adopted laws of one or the other sort;[31] patterns in judicial interpretation of laws of either sort;[32] the weight of scholarly comment approving or disapproving the different types of laws;[33] the competing laws' relative consistency with modern social and economic conditions;[34] and the comparative logic or wisdom of the laws in conflict.[35] In his 1966 article introducing his choice-influencing considerations and in a brief follow-up article, Leflar applied his choice-influencing considerations to a number of hypothetical

29. Leflar, *supra* note 6, at 296-97.
30. *See, e.g.*, Kuehn v. Children's Hosp., 119 F.3d 1296, 1302-03 (8th Cir. 1997).
31. *See, e.g.*, Barrett v. Foster Grant Co., 450 F.2d 1146, 1153 (1st Cir. 1971).
32. *See, e.g.*, Clark v. Clark, 222 A.2d 205, 210 (N.H. 1966).
33. *See, e.g.*, Cipolla v. Shaposka, 267 A.2d 854, 861-62 (Pa. 1970) (Roberts, J., dissenting).
34. *See, e.g.*, Schlemmer v. Fireman's Fund Ins. Co., 730 S.W.2d 217, 219 (Ark. 1987).
35. *See, e.g.*, Benoit v. Test Sys., Inc., 694 A.2d 992, 996 (N.H. 1997).

cases.[36] His explanations of his better-law applications tend to be quite terse, but the factors identified above as commonly invoked by courts in applying better rule of law seem to be the sort that Leflar had in mind.

The last of these factors, the comparative logic or wisdom of the laws in conflict, probably most obviously invites less than objective judgment. In a conflicts case, plausible policy arguments virtually always can be made on behalf of each of the laws in conflict. For a host of reasons, including differences in personal values and perspectives, reasonable judges may differ in the policy arguments that they find most persuasive, and their judgment of the conflicting laws' comparative logic or wisdom may vary accordingly. The fact that a judge finds one law more logical or wiser than another hardly seems to qualify the law as objectively better.

The New Hampshire Supreme Court's better-law analysis in *Keeton v. Hustler Magazine, Inc.*[37] illustrates the extent to which attention to the conflicting laws' comparative logic or wisdom invites highly subjective determinations of "better." According to the majority in *Keeton*, New Hampshire's six-year statute of limitations was better than the one-year limitation periods of the several states more closely connected to the case because a one-year limitation period is "so short that it may unduly burden plaintiffs."[38] The dissent (authored by now-U.S. Supreme Court Justice David Souter) countered that the one-year periods were better because the nature of the harm in defamation cases is such that "defamation claims may be thought to go stale faster than other tort claims do."[39]

Although the majority's policy argument for preferring the six-year statute was plausible, it did not arguably establish the six-year statute as objectively better. For one, the dissent's contrary policy argument was not inherently any less cogent. In addition, any claim that the six-year statute was objectively better is almost impossible to reconcile with the statute's highly idio-

36. Leflar, *supra* note 6, at 310-24; Leflar, *supra* note 10, at 1588-98.

37. 549 A.2d 1187 (N.H. 1988).

38. *Id.* at 1196. The court was especially concerned about the effect of a short limitation period applied in tandem with the widely adopted single publication rule, which starts the limitation period running for the plaintiff's entire action on the first date that any copies of the publication are released for sale to the public.

39. *Id.* at 1204 (Souter, J., dissenting).

syncratic nature. As the majority recognized, but essentially found of no particular importance, the six-year statute was "unusually long"[40]—in fact, twice as long as any other state's—and the year after the suit in *Keeton* was filed, the New Hampshire legislature repealed the six-year statute in favor of a three-year one.[41]

Grounding better rule of law in consistency with modern social and economic conditions seems more conducive to objectivity in decisionmaking than an open-ended appeal to judge the competing laws' comparative logic or wisdom. The difference, however, is probably not all that great. The nature of modern social and economic conditions is sufficiently open to dispute, and in a given instance the range of potentially relevant conditions is typically sufficiently broad, that the implications of this factor for the better-law determination are often anything but clear.

A Rhode Island federal district court's better-law analysis in *Gravina v. Brunswick Corp.*[42] exemplifies the problem. In finding that Illinois law recognizing a cause of action for invasion of privacy was better than the contrary Rhode Island law, the court relied in part on "the steady trend" among states toward recognition of such a cause of action.[43] The court's emphasis, however, was on the consistency of recognition with modern conditions:

> Today, with population, communications and technology continuing their rapid expansion, the need of individual citizens for protection from unwarranted invasions of privacy can scarcely be denied. The court feels that the right of privacy is destined for universal recognition, and it applauds this destiny as founded in the most basic concepts of human rights.[44]

But did modern conditions point so clearly toward recognition?

Even by 1972, the year *Gravina* was decided, it could fairly be said that social mores as to what is fit for public discussion

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40. *Id.* at 1196.

41. *Id.* To avoid any possible misunderstanding, I note that I am not suggesting that the dissent's policy argument for the one-year limitation periods established them as objectively better.

42. 338 F. Supp. 1 (D.R.I. 1972).

43. *Id.* at 6.

44. *Id.*

had evolved to the point that much less was regarded as private than a number of years before. If so, recognition of a privacy action in *Gravina* sensibly might have been seen as going against modern conditions by being more solicitous of privacy concerns than current mores suggested was appropriate. By the same token, in 1972, it was apparent that government had become much more all-encompassing than years before, exercising greater control over people's lives and propagandizing more. Accordingly, recognition of a privacy action in *Gravina* reasonably might have been understood as going against modern conditions by limiting speech by private persons and entities at a time when there was a growing and important need for unfettered speech by nongovernmental speakers.

My point is not that the court in *Gravina* should have found that modern conditions pointed in favor of nonrecognition. Rather, it is simply that the entire enterprise of gauging consistency with modern conditions ordinarily holds little promise of objectivity.

Attention to the weight of scholarly opinion may raise a variety of questions not readily amenable to objective resolution. Is one article in the *Harvard Law Review* worth two in less prestigious journals? Is a student-authored piece worth the same as an article? Do articles vary in weightiness depending on the status of the author? Is the length of an article material? Are more recent articles presumptively entitled to greater weight than older ones? At times scholarly opinion may be so obviously and heavily one-sided that there is little need to ponder these and similar questions in order to determine which of the competing laws is favored by this factor and how strongly. However, more commonly, if not almost always, such questions would require resolution, and the ultimate determination of the weight of scholarly opinion could not help but be quite subjective as a result.

The remaining three factors—trends in state adoptions, number of state adoptions, and patterns in judicial interpretation of laws like those in conflict in the case at hand—all seem substantially more amenable to relatively objective resolution than the three already discussed. All, however, call for information that the court, even with the parties' assistance, may be unable to ascertain with reasonable precision. Most obviously, absent a

survey in a law review or other source of patterns in judicial interpretation of certain types of laws, it is difficult to imagine a court's being able to ascertain such patterns with any exactness. The time entailed in doing a reliable survey on its own would almost certainly be more than the court could spare. Determining trends in state adoptions and number of state adoptions calls for less attention to nuance than trying to discern patterns of broad or narrow interpretation. It is sufficiently time-consuming to determine such trends and numbers with reasonable precision, however, that here, too, it is dubious that the court will have available the relevant information in reliable form unless a study of such trends or numbers already exists. In the absence of detailed information, courts may fall back on intuition in describing patterns in judicial interpretation, trends in state adoptions, and number of state adoptions. To the extent that they do so, they generate problems of subjectivity in judgment akin to those that arise in application of the other factors discussed.

Finally, the potential for subjectivity in the better-law determination is compounded when the court attempts to arrive at the ultimate determination of which, if either, law is better. It must aggregate the various factors, assign them relative weights, and decide when the threshold of "better law" has been passed.

What does all this mean for the possibility of applying better rule of law in a manner that, in keeping with Leflar's policy justification for better rule of law, promises a fairly high degree of objectivity in application? Will a better law emerge only on very rare occasions, perhaps only when one of the laws in conflict is of a sort that no sensible legislator would vote for it today but it is on the books in one or two states simply as a matter of inertia?

At a minimum, I am suggesting that to imbue better rule of law with such objectivity in application, courts need to apply it with considerably more restraint than they have tended to do to date. They should forgo passing judgment on the conflicting laws' comparative logic or wisdom, and they should be very wary of, if not uniformly avoid, passing judgment on the laws' relative consistency with modern social and economic conditions. They also should refrain from assigning significance to the weight of scholarly opinion unless such opinion plainly is strongly in one direction, and they should not rely on trends in

state adoptions, number of state adoptions, and patterns in judicial interpretation unless they either can locate studies documenting such matters or are willing to devote the time to perform such surveys well themselves. Finally, they should reserve the label of "better law" for instances in which, in the aggregate, the various factors examined militate strongly in favor of such a finding.

In presenting better rule of law and illustrating its application, Leflar indicated that courts are not always obliged to declare one of the competing laws better.[45] Particularly by his illustrations, however, he encouraged courts to find a better law with considerable frequency.[46] Under the more circumscribed approach that I have outlined, courts would find a better law far less often.

III. BROADER-BASED OBJECTIONS

Even if better rule of law is applied in a manner that promises a fairly high degree of objectivity in application, serious and in my view insuperable objections remain. Consider the following three scenarios, which are broadly representative of the circumstances in which better rule of law might be invoked:

> 1. The court rejects a forum-state statute in favor of out-of-state law on the basis of better rule of law.
>
> 2. The court rejects forum-state common law in favor of out-of-state law on the basis of better rule of law.
>
> 3. The court rejects out-of-state law in favor of forum law on the basis of better rule of law.

As indicated below, the objections to invoking better rule of law vary with these different scenarios. In all three instances, however, I believe that they weigh decisively against use of better rule of law.

Scenario #1—Rejection of forum-state statute in favor of out-of-state law. The essence of this use of better rule of law is that the forum-state statute is anachronistic and unsound and less apt to produce just results than the more enlightened out-of-state law. As such, this use of better rule of law is in serious tension

45. *See* Leflar, *supra* note 6, at 304, 324; Leflar, *supra* note 10, at 1596.
46. *See* Leflar, *supra* note 6, at 310-24; Leflar, *supra* note 10, at 1588-98.

with prevailing notions of separation of powers, legislative supremacy, and democratic government. Under these principles, the legislature as the branch of government most representative of the people is the ultimate authority as to what constitutes fair and wise policy for the state. In cases confined in their elements to the forum state, courts, implicitly if not explicitly, consistently recognize that these principles require them to defer to the policy judgments expressed in forum-state statutes.[47] It is not apparent why the fact that the court is adjudicating a case with some out-of-state elements, rather than a purely intrastate case, would give the court authority to second-guess the legislature in this regard, and I submit that no such authority exists.[48]

Scenario #2—Rejection of forum-state common law in favor of out-of-state law. This use of better rule of law reflects the view that forum-state common law is anachronistic and unsound and less apt to produce just results than the more enlightened out-of-state law. In this scenario, unlike scenario #1, there is no question of judicial competence to second-guess the wisdom of local law. The courts created the local common-law rule. If they no longer think it is sound, they have every right to change it. The difficulty here, however, is that if the judiciary is persuaded that a local common-law rule is inferior to an out-of-state law, the logical response is to abandon the common-law rule not only in conflicts cases but altogether. Rather than invoke better rule of law in this scenario, the court should be overruling the local common-law rule and adopting a new rule that conforms to its current sense of fair and wise policy.

Scenarios #1 and #2 both present a problem in addition to those already discussed. Both choices of law give rise to unfair discrimination against litigants based on the intrastate or multistate nature of their case. For purposes of illustration, assume that plaintiff A and plaintiff B bring separate suits in a state X court relying on a theory of vicarious liability not recognized by state X law. While B's case is entirely confined in its parties

47. Courts also consistently show respect for these principles in multistate cases when the issue is the appropriate choice of law and the forum-state legislature has enacted choice-of-law legislation directly on point. *See* SIMSON, *supra* note 12, ch. 7 ("Choice-of-Law Legislation"); Cheatham & Reese, *supra* note 22, at 961-62.

48. *See* CURRIE, SELECTED ESSAYS, *supra* note 16, at 104-06 (rejecting a better-law type preference and arguing that it "attributes to courts a freedom and a competence that they do not possess").

and events to the forum state, A's also includes contacts with state Y. In A's case, the X court invokes better rule of law and gives A the benefit of the Y law recognizing the vicarious liability theory upon which A brings suit. In B's case the court reflexively applies existing forum law and dismisses B's suit.

In invoking better rule of law in A's case, the court is, as Leflar explained, attempting to further a policy of achieving justice in the individual case. But does the court have a reasonable basis for seeking to further this policy only in multistate cases like A's and not in intrastate cases like B's? If a court is going to pursue this policy in multistate cases, is it not obligated by both considerations of fairness and the federal constitutional requirement of equal protection[49] to pursue it with no less vigor in intrastate cases? I suggest that once a court gets into the business of choosing out-of-state law as better in conflicts cases, it unfairly and unconstitutionally discriminates against litigants based on the intrastate or multistate nature of their case unless it adopts an equally disrespectful attitude toward forum-state law in intrastate cases.[50]

Of course, where forum-state statutes are concerned, such a disrespectful attitude toward forum-state law in intrastate cases obviously clashes with basic principles of legislative supremacy, separation of powers, and democratic government. That is not a reason, however, for adopting such an attitude only in multistate cases, where the clash with these basic principles is arguably less apparent but, as discussed above, no less real. Rather, it is a reason for declining to apply better rule of law and for not rejecting forum-state statutes as inferior in either intrastate or multistate cases.

Scenario #3—Rejection of out-of-state law in favor of forum law. This use of better rule of law reflects the view that out-of-state law is anachronistic and unsound and less apt to produce just results than the more enlightened forum law. My objection to this use of better rule of law is not to the result that the court reaches, but to how it gets there. If a court's objective

49. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

50. For fuller discussion of the equal protection problem posed by better rule of law, see Gary J. Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61, 85-86 (1978).

is achieving justice in the individual case—the objective that Leflar identified as underlying better rule of law—I believe the court always has a reasonable basis for opting for forum law. Forum law broadly reflects the forum state's collective sense of the most just way of resolving cases like the one at hand.[51] From this perspective, in choosing forum law as a means of achieving justice in the individual case, the court does not have to say that the out-of-state law is anachronistic and unsound and insult the other state in the process. Rather, all it needs to say and should say is that it is applying forum law because that law reflects the forum state's collective sense of justice and because, as a body elected by the people of the forum state or appointed by elected forum-state officials, the court has an obligation to draw its basic sense of justice from the forum state's.

CONCLUSION

Although better rule of law is closely identified with Leflar, the basic concept did not originate with him. Like the other choice-influencing considerations on his list of five, it reflected, in his words, an "effort" to "restate the considerations that have, expressly or impliedly, always underlain common-law choice-of-law decisions, as others have from time to time identified them."[52] Leflar's contribution was essentially two-fold. First, very much in keeping with his insistence on judicial candor and "real reasons,"[53] he called attention to the importance that courts covertly had assigned to better rule of law and urged courts to express openly their reliance on better rule of law if they wished to factor a better-law preference into their decisions. Second, far more explicitly and clearly than prior commentators, he laid out a policy justification for better rule of law.

In my view, Leflar made the best case for an appealing but problematic concept. At the very least, to provide the kind of objectivity in application promised by Leflar's policy justifica-

51. *See* Albert A. Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637, 637-41 (1960); Amos Shapira, *"Grasp All, Lose All": On Restraint and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 255-59 (1977); Gary J. Simson, *Plotting the Next "Revolution" in Choice of Law: A Proposed Approach*, 24 CORNELL INT'L L.J. 279, 289-90 (1991).

52. Leflar, *supra* note 6, at 282.

53. *See, e.g.*, LEFLAR, *supra* note 1, at 119-27; Leflar, *supra* note 6, at 324-27.

tion for better rule of law, better rule of law needs to be applied in a much more circumscribed manner than courts generally have applied it. Even the case for limited application of better rule of law, however, encounters serious objections. Ultimately, despite its attractions, courts seem best advised simply to reject better rule of law.